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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 JAMES BARKER,

Case No. 3:19-cv-00158-MMD-WGC

7 Plaintiff,

ORDER

8 v.

9 BAKER, *et al.*,

10 Defendants.

11 **I. SUMMARY**

12 *Pro se* Plaintiff James Barker, currently incarcerated and in the custody of the
13 Nevada Department of Corrections (“NDOC”), filed a first amended complaint under 42
14 U.S.C. § 1983. (ECF No. 10-1 (“FAC”).) The Court screened the FAC and allowed Barker
15 to proceed on his Eighth Amendment cruel and unusual punishment and Fourteenth
16 Amendment equal protection claims against Defendants Smith and Malay, based on
17 Defendants alleged opening of Barker’s cell door while he was using the restroom. (ECF
18 No. 16 at 4-6.) On February 16, 2021, Barker filed a motion for leave to file a second
19 amended complaint (ECF No. 22 (“Motion”)) and attached his proposed second amended
20 complaint (ECF No. 22-1 (“SAC”)).

21 Before the Court is the Report and Recommendation (ECF No. 27 (“R&R”)) of
22 United States Magistrate Judge William G. Cobb. The R&R recommends the Court deny
23 Barker’s Motion and that this action proceed on the FAC as outlined in the Court’s FAC
24 screening order (ECF No. 16). Barker timely filed his objection (ECF No. 28 (“Objection”))
25 to the R&R, and Defendants did not file a response. Because the Court agrees with Judge
26 Cobb and as further explained below, the Court overrules Barker’s Objection and will adopt
27 the R&R in full.

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1 **II. BACKGROUND**

2 The Court incorporates by reference Judge Cobb’s recitation of the factual
3 background provided in the R&R, which the Court adopts here. (ECF No. 27 at 1-3.)

4 **III. LEGAL STANDARD**

5 **A. Review of the Magistrate Judge’s Recommendation**

6 This Court “may accept, reject, or modify, in whole or in part, the findings or
7 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party
8 timely objects to a magistrate judge’s report and recommendation, then the Court is
9 required to “make a *de novo* determination of those portions of the [report and
10 recommendation] to which objection is made.” *Id.* The Court’s review is thus *de novo*
11 because Barker filed his Objection. (ECF No. 28.)

12 **IV. DISCUSSION**

13 Following a *de novo* review of the R&R and other records in this case, the Court
14 finds good cause to accept and adopt Judge Cobb’s R&R.

15 Judge Cobb recommends Barker’s Motion be denied as it was filed outside of the
16 scheduling order deadline and Barker failed to provide good cause to grant leave to
17 amend. (ECF No. 27 at 5.) Judge Cobb further recommends that the Motion be denied as
18 amendment would be futile. (*Id.*) Barker counters that amendment is not futile because
19 defendant Alredd¹ knew that Barker was using the bathroom. (ECF No. 28 at 2-3.) Barker
20 additionally counters that defendant Bennett² searched him as a response to Barker filing
21 grievances. (*Id.*) The Court agrees with Judge Cobb.

22 The scheduling order in this case was entered on November 24, 2020 and the
23 deadline to add parties or claims was January 22, 2021. (ECF No. 20 at 1-2.) Barker filed
24 his Motion on February 16, 2021—nearly a month after the deadline—seeking leave to file
25 his second amended complaint to add Alredd and Bennett as defendants. Because Barker
26 is now seeking to add parties after the Court has entered a scheduling order, Federal Rule

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28 ¹Alredd was previously dismissed from this action. (See ECF No. 16.)

²Bennett was previously dismissed from this action. (See ECF No. 16.)

1 of Civil Procedure 16(b)(4)'s "good cause" standard for modifying a scheduling order
2 applies, not Rule 15(a)(2)'s more lenient amendment standard that Barker cites in his
3 Objection. The "good cause" standard of Rule 16(b) "primarily considers the diligence of
4 the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,
5 609 (9th Cir. 1992). While the Court may consider prejudice to the nonmoving party as
6 additional reasons to deny a motion, "the focus of the inquiry is upon the moving party's
7 reasons for seeking modification. *Id.* Here, Barker does not provide an explanation, let
8 alone good cause, but merely states that he is seeking to give "a more complete picture
9 as to what occurred." (ECF No. 22 at 1.) The Court, however, finds that this fails to meet
10 Fed. R. Civ. P. 16(b)(4)'s good cause standard.

11 Moreover, Barker's SAC alleges that Alredd repeatedly opened Barker's cell door
12 and forced it open. However, the SAC—similar to the FAC—fails to allege that Alredd
13 knew Barker was using the restroom at the time or that Alredd acted with intent to cause
14 Barker psychological damage. Similarly, the SAC also fails to sufficiently allege facts that
15 Bennett violated Barker's rights under the Eighth Amendment, Fourteenth Amendment, or
16 that Bennett engaged in retaliation. Barker's allegations in the SAC against Bennett are
17 vague and conclusory at best. Accordingly, Barker's Objection is overruled. The Court
18 therefore agrees with Judge Cobb that Barker's Motion should be denied and will adopt
19 the R&R in its entirety.

20 **V. CONCLUSION**

21 It is therefore ordered that the Report and Recommendation of Magistrate Judge
22 William G. Cobb (ECF No. 27) is accepted and adopted in full.

23 It is further ordered that Plaintiff Barker's motion for leave to file a second amended
24 complaint (ECF No. 22) is denied.

25 It is further ordered that this action proceed in accordance with the first amendment
26 complaint screen order (ECF No. 16).

27 DATED THIS 20th Day of May 2021.

28 
MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE